U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 18May2001

CASE NO.: 2000-LHC-1295

OWCP NO.: 1-146705

IN THE MATTER OF:

DENNIS S. HODGKINSON
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

APPEARANCES:

Scott N. Roberts, Esq.
For the Claimant

Peter D. Quay, Esq.
Mark W. Oberlatz, Esq.
For the Employer/Self-Insurer

Before: DAVID W. DI NARDI
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." Hearings were held on September 28 and September 29, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
RX 16A	November 2, 2000 letter of Attorney Oberlatz filing the following documents	11/06/00
RX 13A 11/06/00	Complete Vascular Tests performed on David Goddette on February 23, 1999 at Vascular Associates	
RX 14A 11/06/00	Complete Vascular Tests performed on Timothy Donath on September 10, 1999 at Vascular Associates	
RX 15A 11/06/00	Complete Vascular Tests performed on Timothy Donath on September 20, 1999 at Vascular Associates[1]	
RX 17	March 7, 2000 Deposition Testimony of Dr. S. Pearce Browning, III in the claim filed by Timothy Donath against the Electric Boat Corporation in OWCP No. 1-146289	11/06/00
RX 18	August 31, 2000 Deposition Testimony of Kathryn Leindecker in the claim filed by Glen Cote against the Electric Boat Corporation in OWCP Nos. 1-148088/146053	11/06/00
CX 8	Attorney Roberts' letter	

[1]As RX 15A now completes RX 15, RX 15 is admitted into evidence as a full exhibit. (TR 214)

	11/09/00 suggesting a briefing schedule	
RX 16B 11/14/00	November 6, 2000 letter from Attorney Oberlatz filing the	
RX 19	Employer's November 3, 2000 Form LS-208	11/14/00
RX 20 11/24/00	November 22, 2000 letter from Attorney Oberlatz confirming the briefing schedule	
CX 9	Attorney Roberts' letter	
	12/15/00 jointly requesting a sixty (60) day extension of time for the parties to file their post-hearing briefs	
ALJ EX 7	This Court's **ORDER** granting that request	12/15/00
RX 20	March 26, 2001 letter from Attorney Oberlatz requesting an extension of time for the parties to file their post-hearing briefs	03/26/01
ALJ EX 8	This Court's **ORDER** granting the request	03/27/01
CX 10	March 27, 2001 letter from Attorney Roberts requesting an additional amount of time to file his brief	03/27/01
ALJ EX 9	This Court's **ORDER** granting the request[2]	03/28/01

[2]The request was granted as good cause was shown and as Employer's counsel was granted an extension of time not only in this case but in other cases over which I have presided.

RX 21	Attorney Oberlatz's request that extension not be granted and the record closed	03/29/01
RX 22	Employer's brief	04/30/01
CX 11	Claimant's brief	05/02/01

The record was closed on May 2, 2001, as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant suffered an injury prior to July 23, 1996 in the course and scope of his employment

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The claim for compensation is dated April 29, 1999 (CX 1) and the Employer's notice of controversion was timely filed. (TR 7, line 15)

7. The parties attended an informal conference on January 26, 2000.

8. The applicable average weekly wage is $728.89.

9. The Employer, as of November 3, 2000, has paid permanent partial compensation for ten (10%) percent of each hand, for a total of $23,713.38. (RX 19)

The unresolved issue in this proceeding is the extent of

Claimant's bilateral impairment to each hand.

Summary of the Evidence

Dennis S. Hodgkinson ("Claimant" herein), thirty-six (36) years of age, with a high school education and an employment history of manual labor, began working in November of 1982, several months after graduation from high school, as a structural steel welder at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He worked as a welder for about one year and he then became a grinder and he daily used air-powered, vibratory tools in the performance of his assigned duties on the new class of Trident submarines. He did that work for about one year and he then became a pipe fitter, work that Claimant described as much easier work. He still used air-powered tools such as so-called Whirly Birds, Murphys, etc., once his supervisors realized that he had worked at the shipyard as a welder and grinder. In fact, as grinders were laid-off due to downsizing of the shipyard work force, he was called on to do more grinding. (TR 31-39)

In 1988 Claimant injured his right shoulder in a shipyard accident and the Employer authorized treatment by Dr. Philo F. Willetts, Jr., an orthopedic surgeon. Claimant underwent surgery at the Westerly Hospital, and was out of work for approximately one year to eighteen months. Dr. Willetts rated Claimant's impairment at "between 22 and 23 percent" and Claimant returned to his regular shipyard work after he assured his supervisors that he could do his work. (TR 39-41) He was able to perform his assigned duties although he had trouble doing overhead work. (TR 41)

Claimant continued working at the shipyard until July 23, 1996, at which time he was laid-off in another round of shipyard downsizing, although he took a test in an attempt to continue working as a designer. He then returned to technical school to be retrained for easier work. He attended Bay State School of Tech. to learn the HVAC trade, completing the program in August of 1997 and obtaining a job the following month. (TR 41-43)

Claimant began to experience numbness, tingling and aching

in both hands while still employed at the shipyard, and the doctor's August 18, 1989 progress notes reflect such problems. (RX 8) Cold weather especially bothers his hands; he also has difficulty grasping and holding onto objects such as tools or pens to perform his paperwork, although he is able to perform his duties as a HVAC technician, sometimes with the assistance of a co-worker on a particular job. (TR 44-55)

Dr. Browning has examined and treated Claimant and Claimant has seen him several times. He has also been examined by several other doctors at the Employer's request and these reports will be examined below in the section dealing with the extent of Claimant's bilateral impairment of the hands. (TR 56-78)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v.**

Bethlehem Steel Corp., 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v.**

Director, OWCP, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in

this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal**

Maritime Services Corp., 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 34 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his hand/arm vibration syndrome (HAVS),

resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the

combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant's use of air-powered vibratory tools in the course of his maritime employment at the Employer's shipyard has resulted in bilateral hand problems diagnosed by Dr. Browning as HAVS (CX 2), by Dr. Wainright as "vibratory white finger disease" (RX 3), by Dr. Jones as "mild vascular disease of undetermined cause" (RX 5-2) and by Dr. Willetts as "very mild neuropathy both hands - with equivocal signs of neurological loss." (RX 6-3) I note that Dr. Cherniack, as of July 23, 2000, was reluctant to render a diagnosis and impairment rating on a patient whom he has not personally examined. (RX 7) However, Dr. Cherniack did find a causal relationship between the symptoms and Claimant's maritime relationship. (RX 7-2)

Accordingly, as there are no contradictory opinions on the issue of causal relationship between the HAVS and Claimant's maritime employment, I find and conclude that Claimant has established a work-related injury, that the Employer had timely notice of such injury, timely controverted Claimant's entitlement to benefits and that Claimant timely filed for benefits once a dispute arose between the parties. As noted, the only dispute herein is the extent of Claimant's bilateral impairment to each hand, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington**

Metropolitan Area Transit Authority, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total

disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement and has been permanently and partially disabled from December 1, 1999, according to the well-reasoned opinion of Dr. Browning (CX 2B), as further discussed below.

In the case at bar, Dr. S. Pearce Browning, III, a renowned, distinguished and pre-eminent orthopedic and hand surgeon who has devoted many years to the medical profession and has

examined and treated many shipyard employees, has seen and examined Claimant several times since September 22, 1999, has reviewed the usual diagnostic tests performed on the Claimant and, on the basis of those tests and the physical examination, Dr. Browning opined that the neuromuscular and vascular components of Claimant's HAVS have resulted in an impairment of forty-three (43%) percent of his right hand and forty (40%) percent of his left non-master hand. (CX 2B) Dr. Browning elaborated upon and explained these ratings in his May 15, 2000 and June 13, 2000 supplemental reports (CX 2c, 2d) and he testified before me at the second day of hearing on September 29, 2000. (TR 186-264) Dr. Browning clarified and explained the methodology that he has used for many years in diagnosing, evaluating and treating such hand problems and he vigorously disagreed with those physicians who have opined that his ratings in this case are excessive for various reasons. Moreover, Dr. Browning testified forthrightly before me and his opinions did not waiver in the face of intense cross-examination by Employer's counsel. (TR 235-255, 259)

Dr. William A. Wainright, who obtained his medical degree in 1974 (TR 80) and who has been Board-Certified in Orthopedic Surgery since 1980 and in hand surgery since 1995 (TR 81), has also evaluated many shipyard employees over the years. Dr. Wainright testified that he has done additional study to ascertain the best way to determine the nature and extent of vascular hand problems, that he examined the Claimant on March 24, 2000, that he conducted his usual physical examination and reviewed Claimant's medical records perfected as of that date. Dr. Wainright then described the methodology that he uses to determine the extent of any impairment and he opined that, in accordance with the AMA **Guidelines**, Fourth Edition, Claimant's HAVS could reasonably be rated at ten (10%) percent of each hand. Dr. Wainright always uses the AMA **Guides** because there is no suitable alternate and because the use thereof provides consistency and uniformity throughout the country, the doctor remarking that he does not agree with the **Guides** all of the time but the **Guides** are a good place to start the discussion because they are a consensus document. (TR 79-170)

I note that while Dr. Wainright does not use the so-called "Stockholm Scale... because it's a purely subjective scale," the doctor now realizes that the scale is "more valuable than... (he) thought it was... after reading some of Dr. Cherniack's research that he did at the Electric Boat" as Dr. Cherniack "did

find correlation between the groupings in the Stockholm Scale and the severity of the objective findings as well." (TR 172) The "Stockholm Scale" is in evidence as RX 12.

Dr. Philo F. Willetts, Jr., also a Board-Certified orthopedic surgeon and who obtained his medical degree in 1970, testified before me at the hearing on September 29, 2000 (TR 265-322) Dr. Willetts testified that he has reviewed Claimant's medical records, that he treated Claimant's right shoulder injury in 1989, that he noticed and reported upon Claimant's right hand problems on August 18, 1989 and August 28, 1989 (RX 8), that he has reviewed Dr. Browning's deposition testimony as to the methodology that he uses in HAVS claims, as well as sitting through Dr. Browning's hearing testimony earlier in the morning. Dr. Willetts reiterated his diagnosis that Claimant had "mild bilateral neuropathy of the hands and that the neuromuscular and vasospastic components thereof could reasonably be rated at ten (10%) of each hand in accordance with the AMA **Guides**, the doctor remarking that he has used the **Guides** for the last ten (10) years because he has concluded that they are the best volume to use to determine the extent of the patient's impairment. Dr. Willetts candidly testified that he had learned much from this particular trial, apparently because of the parties' divergent opinions, and he now believes that Table 16 of the **Guides** does a reasonably good job of rating the neurological damage due to HAVS and that Table 17 is used to determine the vascular or vasospastic component of the HAVS. Dr. Willetts prefers to apply the **Guides** because they do provide a uniform set of standards and while there may be a difference of opinion in certain situations, Dr. Willetts expects that any variation from the **Guides** would be explained. (TR 265-302)

Dr. Willetts, in response to intense cross-examination, admitted that he had spoken to Dr. Frank E. Jones at a recent medical seminar, that he (Dr. Willetts) had not examined the Claimant, that a physician can deviate from the **Guides** as long as any variation is adequately explained, that no table in the **Guides** presumes to dictate anything on disability or impairment and that the **Guides** are simply that, a guideline or starting point. Dr. Willetts then described the protocol that he currently uses in examining a patient with hand problems such as symptoms involving numbness, tingling and aching, a protocol that he admitted was much more thorough and complete, partly a response to the increase in claims involving carpal tunnel syndrom, HAVS, etc. and this Employer's decision to defend these

claims vigorously, as can be seen in this case involving two (2) days of hearings and transcripts totaling 332 pages, a case where all of the doctors are in agreement on the causation issue, the only issue being the extent of such bilateral impairment. Dr. Willetts gave credit to Dr. Cherniack for the research that he has done in this area and that he rightly has been given a grant to further study these problems. Dr. Willetts does not use the companion volume to the AMA **Guides** because it is "not the legally mandated reference" in Rhode Island. (TR 302-320)

The parties deposed Dr. Frank E. Jones in Nashville on August 18, 2000 (RX 10) and the doctor, who obtained his medical degree in 1958, who was Board-Certified in Orthopedic Surgery in 1968 and in hand surgery in 1989 and who retired from his active medical practice in 1998, testified that he has examined "many thousands of carpal tunnel patients" over the years, that he is very familiar with hand/arm vibration syndrome and Raynaud's phenomenon, that he has been asked by the AMA "to be the chairman of the chapter on the upper extremity" in the recently published Fifth Edition of the AMA **Guides** and that the purpose of the **Guides** is to provide consistency throughout the country. In 1999 the AMA issued "the **Casebook Companion for the AMA Guides** because there were several items that needed clarification." (RX 10 at 3-20)

Dr. Jones then described the protocol that he uses to evaluate a patient with CTS or HAVS, the doctor remarking, "Then, of course, the physical examination is very important and (it) depends on what the problem is... So the basic parts are a history (report) and a physical examination." (**Id.** at 21) Dr. Jones then described the various diagnostic tests that are performed as part of his usual protocol. (**Id.** at 21-27)

Dr. Jones disagreed with the protocol utilized by Dr. Browning and, in fact, he even disagreed with Dr. Browning's written reports because "the history (report) has been deficient," Dr. Jones agreeing that Dr. Browning does not follow accepted medical protocol in arriving at his diagnosis and impairment ratings. (**Id.** at 27-31)

Dr. Jones, in response to intense cross-examination by Claimant's counsel, admitted that he had performed other medical review of records for the Employer, in addition to that of the Claimant, that the Fifth Edition of the **Guides** was needed

because “some new information is coming out,” that this edition involves balancing the interests of the doctors, lawyers, patients and other interest groups and that impairment and disability are two separate concepts, Dr. Jones concluding with a comparison of the effect of a left little finger impairment experienced by a concert violinist and a lawyer. Thus, while “the impairment is exactly the same as determined by the doctor... their disability as determined by the courts may be quite different.” (**Id.** at 31-40, 57-60, 93-95)

Dr. Jones then differentiated between CTS, Raynaud’s phenomenon or disease and he testified about his work for an automobile manufacturer in Tennessee in dealing with CTS and other such problems. (**Id.** at 41-49) Dr. Jones further agreed that a worker with CTS or HAVS should refrain from use of air-powered vibratory tools, should keep out of cold weather, if cold weather bothers him/her, should also wear gloves if they are helpful, should also wear a hat and stop smoking and he would refer the patient “to an internal medicine specialist to handle the medication.” (**Id.** at 40-55)

Dr. Jones reiterated his opinions that the patient’s history report and the physical examination are very important in determining the extent of impairment. (**Id.** at 56)

Dr. Jones candidly admitted that he has not visited a shipyard, has absolutely no idea how submarines are built or what work is done by grinders, pipe fitters, welders, etc., that some of the diagnostic tests that he performs are effort dependent and that he uses a variety of those tests depending upon the patient’s symptoms. (**Id.** at 57-92, 95-97)

With reference to Claimant’s bilateral hand symptoms, Dr. Jones testified that he reviewed Claimant’s medical records, that he found Dr. Browning’s history report to be deficient, that the doctor conducted various tests as part of the physical examination and his protocol, that based on Claimant’s abnormal laboratory tests that he had a Class 1 impairment of three (3%) percent impairment to each upper extremity, Dr. Jones remarking, “These AMA **Guides** are not cookbooks” and that “If you justify what you say, then you can deviate from them a little bit.” Dr. Jones disagreed with the ratings expressed by Dr. Browning because Claimant had none of the symptoms that would place him in the upper end of Class 2. (**Id.** at 97-117)

Dr. Jones, in response to additional cross-examination, admitted that the AMA **Guides** are simply "guides; they're not cookbooks, and they can't cover every possible instance." When asked to elaborate, the doctor replied:

> **I mean - by a cookbook, I mean a very precise enumeration of exactly what needs to be done but people are so complicated and that you can't cover every possible instance. And so one has to use his medical skills to try to come to the right diagnosis and try to do the fair thing.**

(**Id.** at 118, ll 18-25)(Emphasis added)

Furthermore, Dr. Jones admitted that the **Guides** are not a perfect fit and that sometimes it is necessary to round off the corners a bit (**Id.** at 119) and then when a doctor deviates from the **Guides**, "you should justify it in writing with reasonable logic." (**Id.** at 120) While Dr. Jones was able to make certain allowances for the deficiencies of Dr. Wainright's history report, he was not willing to do so for Dr. Browning's report. (**Id.** at 123) However, Dr. Jones did fault the manner in which the two-point discrimination test was performed by Dr. Browning, Dr. Wainright and Ms. Leindecker. (**Id.** at 126) Dr. Jones did not know how Dr. Wainright arrived at his ten (10%) impairment rating, Dr. Jones explaining that difference as follows:

> **Well, some things are more complex than others. For most things, most doctors ought to be pretty close.**

(**Id.** at 141, ll. 20-22)(Emphasis added)

Dr. Jones was unaware that, as of July 21, 2000, Dr. Willetts rated Claimant's bilateral impairment at eleven (11%) percent. (**Id.** at 143) Dr. Jones saw no evidence that Claimant had carpal tunnel syndrome and the doctor stated, "I can't speak for Dr. Browning (as to) how he came to his conclusions." (**Id.** at 145)

The parties deposed Ms. Kathryn Leindecker on August 31, 2000 in connection with a claim filed by Glen Cote against Electric Boat Corporation and another employer and Ms. Leindecker described the methodology that she utilizes in administering the so-called two-point discrimination test. (RX 18)

As noted, the parties deposed Dr. Browning on March 7, 2000 with reference to the claim filed by Timothy Donath against the Employer and again Dr. Browning explained and described the protocol that he uses in the diagnosis, evaluation and treatment of the hand symptoms involved in this proceeding. (RX 17)

The parties also deposed Dr. Martin G. Cherniack on September 25, 2000 and the doctor, who presently is Medical Director of the Ergonomics Technology Center in Farmington, Connecticut, in my judgment, is one of the foremost and pre-eminent physicians in the field of Occupational Medicine, dealing especially with CTS, HAVS and other such problems since the early 1980s. Since 1986 the doctor has been conducting studies on employees and their use of vibratory tools at the Employer's shipyard. These studies have been published and just recently NIOSH has "committed itself to funding one collaborative program in hand/arm vibration" at his center. Dr. Cherniack then testified as to HAVS, CTS and other hand/arm problems and their relationship to the use of certain tools. Dr. Cherniack is very familiar with the Stockholm Workshop Scale - "essentially a consensus group that has met to discuss hand/arm vibration, its measurement, the physiology, the disorders." The scale itself was introduced in 1987. (RX 11 at 3-13)

According to Dr. Cherniack, the scale is used to rate the level or intensity of the symptoms and the doctor proceeded to describe the respective symptoms at each level, as well as the various tests used to diagnose the existence of HAVS. (**Id.** at 14-22)

With reference to Claimant's bilateral hand problems, Dr. Cherniack reviewed the report and progress notes of Dr. Browning but was unable to make a diagnosis because "there were some things in here which were of interest and which (he) thought essentially needed further evaluation." Dr. Cherniack tries "to stay consistent with the AMA **Guides**, although (he) realize(s) the AMA **Guidelines** are not precise in this" and the doctor then proceeded to describe generally the presence of certain symptoms and their rating in the AMA **Guides**. As noted, the doctor also uses the Stockholm Scale in giving his impairment ratings. Dr. Cherniack is reluctant to give an impairment rating for an individual he has not examined but he did disagree with Dr. Browning's rating as excessive, the doctor remarking that Claimant's impairment "would be anywhere from 5 to 25 percent

and that would really depend principally on his test results." (**Id.** at 22-42)

Dr. Cherniack further testified that he uses a combination of the AMA **Guides**, Stockholm Workshop Scale and the plethysmnographic testing and symptoms to arrive at an impairment rating, and he then proceeded to explain why he uses that combination. The doctor is familiar with the testing protocol used by Dr. Browning and he agreed with some of those tests that Dr. Browning performs. (**Id.** at 43-60)

As can be seen from the above extensive summary of the medical evidence, this proceeding essentially boils down to the classic battle of the medical experts and a dispute as to whether Claimant's accepted repetitive/cumulative trauma injury has resulted in a forty-three (43%) percent permanent partial impairment of the right hand and a forty (40%) percent of the left hand, according to Claimant's treating orthopedic physician, Dr. Browning (CX 2B), or a ten (10%) percent impairment of each hand by Wainright, or eleven (11%) percent impairment of each hand by Dr. Willetts, or by Dr. Jones as three (3%) percent impairment of each hand. These ratings and the doctors' testimony in support thereof have been extensively summarized above.

In **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 1042, 1043, 31 BRBS 84 (CRT) (2nd Cir. 1997), the United States Court of Appeals for the Second Circuit found that the opinion of the Claimant's treating physician is to be accorded greater weight by the Administrative Law Judge when deciding the existence and nature of their disability. Similarly, the Ninth Circuit has stated "[w]e afford greater weight to the treating physician's opinion because he is employed to cure and has a greater opportunity to know and observe the patient as an individual." **Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (9th Cir. 1999).

The case law suggests that a doctor can become a treating physician after only meeting with the Claimant once. In **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 1043 (2nd Cir. 1997), Dr. Ruggiano, the primary treating physician, based his opinion of the Claimant's psychiatric condition on observations made over a two year period. However, Dr. Aberger, another psychiatrist, is also described by the Court as a treating physician even though he only performed a psychiatric evaluation

of the Claimant and met with him on a single day. (**Id.** at 1043) The Second Circuit referred to the "unconverted and unanimous evidence of Pietrunti's treating *physicians*," in the context of the Claimant's psychiatric disability. (**Id.**) Similarly, the Court later reversed the ALJ's Decision for overriding the medical decisions of both Dr. Ruggiano and Dr. Aberger. (**Id.** at 1044) Taken in context, these references show that Dr. Aberger was also a treating physician and that a Claimant could have a treating physician who met with him once and followed his evaluation by recommending a course of treatment of the Claimant.

Treatment is "a broad term covering all the steps taken to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies." **Black's Law Dictionary**, 6th Edition (West, 1990, p. 1502). Rather than place the Court in the difficult business of deciding how many patient-doctor meetings are necessary to make the latter a treater, this determination can be more accurately made based on the services the physician provided to a patient.

The record shows that Dr. Browning met with the Claimant twice, on September 22, 1999 and December 1, 1999 with the initial exam "lasting well over an hour." (CX 6 at 26 and 33; TR at 56) In these meetings, Dr. Browning performed an evaluation of the Claimant's hands and then provided an impairment rating. Dr. Browning gives a rating after an evaluation only if he deems it appropriate to provide one. (TR 263) During the second office examination, Dr. Browning repeated the fingertip pin prick test on the Claimant but he used the majority of the time to discuss his findings with the Claimant. (TR at 74) Dr. Browning, in addition to making recommendations concerning what the Claimant should avoid doing, also informed Claimant that "[h]is cholesterol is up ... I have asked him to see the Hope Valley Clinic. I have emphasized to him that he needs to take proper care of his cholesterol." (CX 2B)

Opposing counsel has claimed that Dr. Browning does not qualify as a treating physician, in part, because he did not prescribe drugs or physical therapy to the Claimant. In his deposition and at trial, Dr. Browning went over these suggested courses of treatment and explained why they were inappropriate. In general, physical therapy is not effective for treating hand/arm vibration syndrome. (CX 6 at 48) Likewise, for

reasons explained at trial, anti-inflammatory medication would not help Claimant. (TR at 253-255) Since the Claimant no longer uses air tools, anti-vibration gloves will not help him in his present work. (TR at 253) Dr. Browning did agree with Dr. William Wainright that wrist splints might help the Claimant at night. (**Id.**) This was the only beneficial treatment Dr. Browning did not suggest to the Claimant.

Dr. Browning recommended to the Claimant that he keep away from air or vibrating tools and "not to work in ambient temperatures below 50 degrees Fahrenheit." (**Id.**) This is the standard recommendation that is made to avoid worsening of hand/arm vibration syndrome, and even Dr. Frank Jones the Respondents' expert, concedes that "there's really not a lot to do. The main thing is to get them out of further injury, get them to stop smoking if they do smoke, keep them out of the cold and have them wear gloves and a hat when out in the cold." (RX 10 at 46 and 50) Dr. Jones also admitted that sympathetic block medication had "really not proven to be very useful and I don't use them anymore or I did not use them at the time I retired." (**Id.** at 46)

Dr. Browning evaluated the patient's problems, provided a diagnosis and recommended that the Claimant do certain things to avoid further injury and pain. Dr. Browning also informed the patient that he had a medical problem unrelated to his hand/arm vibration syndrome and that he needed to take proper care of this problem, his cholesterol level. Dr. Browning had more opportunity to observe the Claimant than Dr. Wainright and given his recommendations, he apparently intended to treat the patient. Dr. Browning therefore meets the definition of a treatment physician as stated in **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 1043, 1043, 31 BRBS 84 (CRT) (2nd Cir. 1997); **Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (9th Cir. 1999), and his opinion should be accorded more deference than that of Dr. Wainright.

On the second day of trial, Attorney Peter D. Quay, counsel for the Respondent, essentially told Dr. Browning that he considered his approach "junk science" because he could not tell the source or rationale for particular numbers in his report. (TR at 261) Based on the opening statement made by Mr. Quay, the Employer appears to believe that the AMA **Guides** meet the **Daubert** test because they are "peer reviewed" and therefore comply with scientific methods. (TR at 26) At the heart of

Employer's argument is the proposition that those who use the AMA **Guidelines** are using a system derived by scientific method and those who use their own system, such as Dr. Browning, are using a non-scientific, invalid approach. In actuality, Dr. Browning's opinions are based on his thirty-eight and one-half years of medical experience and he forthrightly represents that they are within the realm of reasonable medical certainty. (TR at 263)

I further find and conclude that the AMA **Guidelines** themselves are not scientific and do not meet the **Daubert** test. At best, the AMA **Guides** are a consensus document whose ratings are also within the realm of reasonable medical certainty. At worst, these **Guides** are an arbitrary system designed so that two practitioners in different states will provide a consistent rather than a scientifically derived number when rating an impairment. In either case, the AMA **Guidelines** have less validity than Dr. Browning's ratings derived from his own experience.

In **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 593, 113 S.Ct. 2786, 125 L.Ed. 2nd 469 (1993) the Supreme Court states: "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." **Daubert** allows the trial court judge to screen purportedly scientific evidence according to Federal Rules of Evidence 702. "[I]n order to qualify as scientific knowledge, an inference or assertion must be derived by scientific method." **Daubert**, page 590. The **Daubert** rule is flexible and in addition to requiring the application of the scientific process, it also looks to see if a method, technique or theory has been: subjected to peer review; what is known or potential rate of error; whether it is subject to general acceptance in the relevant scientific community; and whether the theory or method has been published in a peer reviewed journal. **Daubert**, pages 593-594. Without compliance with the first requirement that the scientific method be used, a rating system cannot be described as being scientific and complying with **Daubert**. Neither Dr. Browning, nor the AMA **Guides** nor any physician depending on the AMA **Guides**, meet the **Daubert** standard since their ratings are not the product of one or more scientifically controlled studies. They instead rely on reasonable medical certainty which is their experience or that

of others encapsulated in the AMA **Guides** in place of empirical scientific data.

Dr. Frank Jones who served as the Chairman for the upper extremity chapter of the AMA **Guides** Fifth Edition, has testified in his deposition that the "AMA **Guides** have been criticized because they're not scientific. That is you can't refer to a scientific study that says a finger is worth a certain percent of the body as a whole. And that's right; there isn't any science about it. It is a consensus document." (RX 10 at 16-17) "The purpose is to try to provide a framework so that a guy in Minnesota who had an injury will get approximately the same rating as a guy in Tennessee." (RX 10 at 16) Dr. Jones freely admitted that writing the AMA **Guides** was "a very politicized process and we have to try and satisfy as many different constituencies, you know. It's not just a doctor thing. I mean the lawyers get involved in it and the unions and the employers and everybody wants to shape it to his particular goals. And so there's a lot of conflicts trying to get that done. That's why it's taken us - I've been working on it for a year and a half." (RX 10 at 15-16)

While the Employer submits that the AMA **Guides** are peer reviewed, Dr. Jones' deposition clearly shows that the upper extremities chapter of these **Guides** has no scientific backing and is the result of a highly politicized process involving compromises by all interested parties. Any doctor who assigns an impairment rating in a hand/arm vibration case based solely on the AMA **Guides** is by Dr. Jones' own admission, using an unscientific approach which cannot meet the **Daubert** standard governing the admissibility of scientific evidence, and I so find and conclude.

Some doctors like Dr. Wainright use the Tables as their "foundation" for rating impairments and view with suspicion any substantial deviation from the AMA **Guides**. (TR at 122) Dr. Wainright's opinion is that the **Guides** were created by "the leaders of the field in our country and indeed, in the world and that it is incumbent upon the deviating doctor to explain why his impairment ratings are different from the **Guides**." (TR at 123) In reality, the **Guides** are not an irrebuttable standard but one created (in Dr. Jones' words) to satisfy different, non-medical constituencies. The AMA **Guides** are not a purely medical document but a hybrid document combining medical and political influences. Accordingly, I find and conclude that the AMA

Guidelines should not be accorded more deference and perhaps even less deference than Dr. Browning's own system for rating hand/arm vibration impairment and disability, a system that is based on the methodology the doctor has used for many years.

The AMA **Guidelines** should not be relied upon the by the Court when the treating physician disagrees with its conclusions. "Because the Longshore Act does not require adherence to any particular Guide or formula, an administrative law judge is not bound to apply the **Guides**." **Mazze v. Frank J. Holleran, Inc.**, 9 BRBS 1053, 1055 (1978). An administrative law judge has significant discretion in determining the proper percentage for loss of use. **Michael v. Sun Shipbuilding & Dry Dock Co.**, 7 BRBS 5 (1977).

Dr. Browning's ratings in this case are so different from those given by the Employer's experts because he is rating not only impairment but disability. Disability under the Longshore Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644, 648 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F.Supp. 770, 774 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Consideration must be given to the Claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263, 1265-1266 (D.C. Cir. 1970). The extent of the disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine Inc.**, 525 F.2d 46, 49 (9th Cir. 1975).

Dr. Browning has stated that his ratings are based on "history, what they [the Claimant] does at work, both at Electric Boat and also what they do after they've left Electric Boat and what they can't do after they have left Electric Boat. I am looking at what their avocations may be. How does - how does this, if you will, loss of function or impairment fit into their overall daily or into their life and their life picture as to what they cannot - can and cannot do." (TR at 242)

After the Claimant left Electric Boat, he obtained a job doing heating, air conditioning and refrigeration (HVAC) in 1997. His hand/arm vibration syndrome problem made his hands more susceptible to cold, interfering with his ability to work in walk-in freezers and greatly impairing his ability to work on heating and air conditioning mechanical rooftop units during the

winter. (TR at 48, 50) Claimant, while working outside in the winter, would lose the ability to manipulate and even feel the screws that he uses to attach the sheet metal in the HVAC units. He would frequently drop tools and his hands would "hurt so bad" that he would have to go inside to warm them up while his co-workers would "stay out there all day." By the end of the day, the Claimant's hands hurt so badly that he could not write up paperwork using a pen or pencil and had to take these forms home and fill out later. (TR at 50, 51)

The Claimant testified that he was going to have to find a new job "because I'm not going to go through another winter like that of last year working on the roofs. I'm going to try and find an in-house job where I'm working taking care of a complex like this, because it's just physically, you know, draining me, draining my hands ... I know I can't keep up with them guys. We have a crew of a lot of young kids coming in. It's, they just start to outwork me." (TR at 52)

The Claimant's permanent partial disability will eventually force him to leave a well paying job for uncertain prospects. he is a skilled laborer but his employment prospects are somewhat limited by his inability to work outside during the winter experiencing chronic pain in his hands and such chronic pain is a part of disability. **Frye v. Pepco**, 21 BRBS 194, 196-197 (1988). **See also Bass v. Broadway Maintenance**, 28 BRBS 11, 16-17 (1994). Claimant requests that the Court accept Dr. Browning's ratings over Dr. Wainright's because Dr. Browning acted as a treating physician and because of his disability rating more accurately reflects the impact of Claimant's hand/arm vibration syndrome on the Claimant's daily life and his ability to earn a livelihood.

On the basis of the totality of this closed record, this Administrative Law Judge, having reviewed the entire record, finds and concludes that the opinion of Dr. Browning is well-reasoned and well-documented and best effectuates the purposes of this beneficent and humanitarian statute.

Initially, I note that the Longshore Act does not require that permanent partial disability be based on the **AMA Guides**, except in two circumstances: hearing loss and occupational disease claims by retirees. 33 U.S.C. §902(10) 908(c)(13)(E),(c)(23) The Benefits Review Board has explicitly held that an Administrative Law Judge is not required to use the

AMA Guides. **Mazze v. Frank J. Holleran, Inc.,** 9 BRBS 1053 (1978). Indeed, the term "permanent impairment," which is the central concept in the **Guides'** rating system, is not even used by the Longshore Act. Rather, the Act speaks in terms of awards for permanent partial "disability" and provides for a proportionate award when there has been a partial loss or partial loss of use of a scheduled body part. This broader language has led the Benefits Review Board to acknowledge that an Administrative Law Judge has the authority to look at all of the evidence concerning the impact that an injury has had on an individual's earning capacity and has accorded to Administrative Law Judges significant discretion in determining the proper percentage for loss of use. **Michael v. Sun Shipbuilding & Drydock Co.,** 7 BRBS 5 (1977).

Moreover, the Board has also recognized the effect that chronic pain plays in an individual who has sustained a so-called schedule injury as a result of a covered work-related injury and, in appropriate factual circumstances, has permitted an ongoing award of permanent partial disability benefits, pursuant to Section 8(c)(21) of the Act. In this regard, **see Frye v. PEPCO,** 21 BRBS 194 (1988).[3]

It is apparent that the doctors referred to herein recognize the limitations of the **Guides** as they apply to cumulative trauma types of injuries, and injuries where chronic pain significantly limits the individual's work capacity. The difference between these opinions, though, is reflected in the rating of Dr. Browning, a rating which is the higher rating and which explicitly reflects the impact of the injury as a whole on Claimant's long-term work capacity. Consequently, it is the better and more reliable evaluation of the impact of the injury, and I so find and conclude.

The fact that Claimant has been able to secure a job that he can do within his permanent limitations does not alter the fact that this injury has had an impact on his work capacity. He testified that his job opportunities are very limited by the fact that he cannot do anything but the lightest work with his arms and cannot do any repetitive hand motion. The job he has

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[3]**See also Bass v. Broadway Maintenance,** 28 BRBS 11, 16-17 (1994).

secured, although not strictly speaking light duty, is, nonetheless, one that he is able to do within his restrictions, sometimes, with the help of a co-worker.

Dr. Browning has been Claimant's treating orthopedist since at least September 22, 1999 (CX 2), has followed a disciplined approach to impairment evaluation and has provided an impairment rating which takes into account the impact that Claimant's daily chronic pain and his inability to perform his regular work at the shipyard.[4] Thus, Dr. Browning's is the more well-reasoned and the more well-documented opinion in this closed record, and I so find and conclude.

I cannot accept the Employer's essential thesis that I should apply the **Guides** strictly herein because they are an **objective** method of evaluating permanent impairment. I disagree because it is that **objective** aspect which does not, and cannot take into account, Claimant's chronic pain, a condition which affects his daily living and prevents him from returning to the shipyard and his former high-paying work.

While I am most impressed with the professional qualifications of Dr. Wainright, Dr. Willetts, Dr. Jones and Dr. Cherniack, and I have accepted and credited their opinions in other matters over which I have presided, I simply cannot accept the opinions of Dr. Wainright, Dr. Willetts and Dr. Jones in this case for the foregoing reasons. Furthermore, this Administrative Law Judge, in his discretion, may give greater weight to the opinions of the Claimant's treating physician, and I do so in this case to effectuate the purposes of the Act because, in my judgment, the automatic application, or by rote, if you will, of the **Guides** will do a manifest injustice to the Claimant. In this regard, **see Amos v. Director, OWCP,** 153 F.3d 1051, (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (9th Cir. 1999); **see also Pietrunti v. Director, OWCP,** 119 F.3d 1035, 31 BRBS 84 (CRT) (2d Cir. 1997).

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[4]**Frye** is being cited herein only with reference to the added impairment being added to Claimant's daily activities due to his chronic pain. There is no Section 8(c)(21) claim herein, and this closed record does not establish, at this time, a loss of wage-earning capacity.

Accordingly, I find and conclude that Claimant's disability can be reasonably rated at forty-three (43%) percent permanent partial impairment of the right hand, and forty (40%) percent permanent partial impairment of the left hand, pursuant to Section 8(c)(1) of the Act.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), Employer timely controverted Claimant's entitlement to benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative

application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf**

Stevedores, Inc. v. Neuman, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on or about April 29, 1999 (CX 1) and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care until November 3, 2000. (RX 19) Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer as a self-insurer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after January 26, 2000, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to Claimant compensation for his forty-three (43%) percent permanent partial disability of the right hand, based upon his average weekly wage of $728.89, such compensation to be computed in accordance with Section 8(c)(1) of the Act.

2. The Employer shall also pay to the Claimant compensation for his forty (40%) percent permanent partial disability of the left hand, based upon his average weekly wage of $728.89, such compensation to be computed in accordance with Section 8(c)(1) of the Act.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his bilateral hand/arm injury referenced herein.

4. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961

(1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, commencing on September 22, 1999 (CX 2A), subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on January 26, 2000.

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DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jl